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NO. 77-116

IN THE

SUPREME COURT OF THE UNITED STATES

* * * *

RICHARD RUSSELL, Petitioner

VS.

THE STATE OF TEXAS, Respondent

* * * *

PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

* * * *

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TO THE HONORABLE SUPREME COURT OF
THE UNITED STATES:

Petitioner, Richard Russell, respectfully submits this his Response to the Brief in Opposition to Petition for Certiorari filed by the State of Texas herein and respectfully shows the Court as follows:

The issue which Petitioner submits to this Court for decision is clearly and sharply defined. Both Petitioner and the State agree that the question presented by this Record is whether or not it is Constitutionally permissable for a State Court to revoke probation in sole reliance upon a particular alleged criminal offense subsequent to a verdict of not guilty upon an indictment based upon the identical offense. (Petition for Writ of Certiorari p. 2, Brief in Opposition p. 1). Petitioner urges that the termination of a prosecution in favor of the accused is a bar to further proceedings under the principles of Double Jeopardy and collatoral estoppel within the contemplation of the Fifth Amendment to the Constitution.

It is the position of the State of Texas, as Petitioner understands it, that the Double Jeopardy provisions of the Fifth Amendment do not apply to probation revocation proceedings. (Brief in Opposition p. 3). In support of this proposition the State marshalls the familiar contentions that:

(1) "...the nature of the revocation proceeding is not a criminal trial."

(2) "Probation is not a right but is granted as a matter of grace."

(Brief in Opposition p. 3)

In reply to the first point, Petitioner shows that a revocation proceeding is a vital and integral part of the criminal justice process to which Federal Constitutional principles clearly apply. Mempa vs. Rhay, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed. 2d 336. A State Court's characterization of a proceeding as "civil", "criminal", or even "quasi administrative" is not sufficient to avoid the thrust of the Constitution. Kent vs. United States, 383 U.S. 541, 16 L.Ed. 2d 84, 86 S.Ct. 1045; Re Gault, 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428; Smith vs. Bennett, 365 U.S. 708, 712, 6 L.Ed. 2d 39, 81 S.Ct. 895.

The decision of the Court of Criminal Appeals of Texas below is based upon the same attempted distinction between a criminal probation revocation proceeding and a criminal "prosecution." The Court states in Russell vs. State, 551 S.W.2d 710 at page 714 :

"...This is a revocation proceeding and as such is not a criminal prosecution."

"...Thus in criminal cases in which an individual has once been hailed before a jury or a judge and found innocent, res judicata, including collateral estoppel, rests upon the double jeopardy clause of the Fifth Amendment and prevents a second prosecution for the same conduct or subject matter. Obviously that is not the situation in a revocation proceeding. It is not a 'prosecution.'

The fallacy of this reasoning is perhaps best illuminated by another Opinion of the Court of Criminal Appeals of Texas in Campbell vs. State, 456 S.W.2d 219, wherein the Court, per Presiding Judge Onion, noted:

"Since the earlier decisions of this Court concerning the nature of the revocation proceedings, it has now been held that while the State is not constitutionally required to provide for probation and revocation proceedings as part of it's criminal process any more than it is required to provide for Appellate review, when it does then due process and equal protection of the law is fully applicable thereto. (Citing numerous authorities.) It would

> indeed now be difficult to conclude that probation revocation hearings are not criminal proceedings where substantial rights of an accused may be affected. (Citing Mempa vs. Rhay, supra). The revocation proceedings cannot be isolated from the context of the criminal process." (Emphasis supplied).

Thus it is clear that criminal probation revocation proceedings are criminal proceedings subject to federal constitutional safeguards is a principle recognized and enunciated by both the Court of Criminal Appeals of Texas and this Court.

The State next attempts to avoid the inevitable application of the Constitution to the proceeding at bar by contending that, "Probation is not a right but is granted as a matter of grace." (Brief in Opposition, p. 3). This Court has repeatedly rejected this position, recognizing that although the original order granting probation may have been a privilege, a favor, or an exercise of

of the chancellor's grace, it does not follow that constitutional rights do not surround it's revocation. Schware vs. Board of Law Examiners, 353 U.S. 232, 1 L.Ed. 2d 796, 77 S.Ct. 752; Slochower vs. Board of Education, 350 U.S. 551, 100 L.Ed. 692, 76 S.Ct. 637; Mempa vs. Rhay, supra.

The State next contends that since the burden of proof in a probation revocation hearing is different from that under an indictment--i.e. a preponderance of the evidence vs. beyond a reasonable doubt--"ipso facto" the provisions of the Double Jeopardy Clause do not apply to revocation proceedings (Brief in Opposition p. 4). The State argues:

> "A fact finder could well have determined that a defendant had committed an offense by a preponderance of the evidence, but because they still entertained a reasonable doubt, they are legally found to render a verdict of not guilty. Thus a verdict of not guilty does not necessarily include a finding of not guilty by a preponderance of the evidence."
>
> (Brief in Opposition p. 4)
> (Emphasis Supplied)

The fallacy in this reasoning and the constitutional mischief to which it leads is readily apparent. A fact finder returning a verdict of "not guilty" could just have well have determined that a defendant had not committed an offense by any standard of proof. Thus, a verdict of not guilty does not necessarily preclude a finding of not guilty by a preponderance of the evidence or any other formulation of degree of proof.

In our system of jurisprudence an accused citizen under indictment stands before the trier of fact, which is charged to find him guilty of the offense beyond a reasonable doubt or to find him not guilty. The State would have reviewing Courts speculate on that which "a fact finder could well have determined," and then to presume that the fact finder's determination is consistent with the guilt of the accused, rather than with his innocence. Thus the State would in effect transform the presumption of innocence into a presumption of guilt. Once again the fundamental

constitutional problem here is illuminated by a passage in the opinion of the Court of Criminal Appeals below. The Court states in Russell vs. State, 551 S.W.2d 710 at page 714 :

> "The Federal Constitution as well as the Texas Constitution prohibit placing an accused twice 'in jeopardy' for the same offense. Thus, in criminal cases in which an individual has once been hailed before a jury or a judge and found innocent, res judicata, including collateral estoppel, rests upon the double jeopardy clause of the Fifth Amendment and prevents a second prosecution for the same conduct or subject matter." (Emphasis supplied).

Clearly in our system we do not hail individuals before judges and juries and find them"innocent". We bring individuals presumed to be innocent before judges and juries and find them guilty or not guilty.

In the case at bar the Petitioner was indicted, tried, and found not guilty. The State would have this Court presume that the verdict of not guilty was consistent with the guilt of the accused, rather than with his innocence, the

presumption to which he is constitutionally entitled. The State would have this Court presume as a matter of law that the verdict of not guilty did not contain some element of a resolution of some factual controversy in favor of the accused. This leads directly to the holding of the Supreme Court in United States vs. Jenkins, (1975) 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed. 250, wherein such contention was squarely faced and unequivocally rejected.

The State contends that in the instant case the record indicates that the Court never made a finding as to the criminal acts alleged in the indictment, but instead found that the State had not proved the venue allegation. (Brief in Opposition p. 5, footnote 1). The actual record, the pertinent part of which is reproduced on the same page of the State's brief is not limited or equivocal as the State contends. The Court simply states:

> "There being nothing further, the Court finds that the State has not proven the indictment in Cause No. F-75-12165 by the legal and competent evidence

> beyond a reasonable doubt, and finds the Defendant to be not guilty in that case."

The State then notes that this case involved an intricate land fraud situation, but would have this Court presume that the Trial Court did not resolve some factual element of an admittedly complex case in favor of the accused. Finally, the State would avoid the manifest operation of the Double Jeopardy Clause by contending that Petitioner is not imprisoned for the offense of which he was found not guilty, but for the underlying offense for which he was placed on probation. The State argues, "In the instant case ... the offense which jettisons deprivation of liberty is not that which was alleged in the motion to revoke . . ." (Brief in Opposition p. 7). Petitioner respectfully submits that this reasoning is at best an artful sophistry. The real fact of the matter is that prior to being charged with theft in the motion to revoke and contemporaneous indictment

the Petitioner was at liberty. As a direct and proximate result of the revocation proceeding Petitioner is now imprisoned in the Texas Department of Corrections. There can be no question but that the immediate cause of Petitioner's incarceration was the Trial Court's finding that he had committed the offense of theft, of which he had previously been acquitted.

Petitioner realizes that probation may be revoked for conduct that is less than criminal, but when the State relies solely upon the commission of a criminal offense as a basis for revocation it may not rely upon an offense of which the accused has been acquitted.

CONCLUSION

Federal Constitution prohibitions clearly apply to State criminal revocation proceedings. Thus, a verdict of not guilty is a bar to a probation revocation based upon the same.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Response to Brief in Opposition to Petition for Certiorari has been forwarded to John Pierce Griffin, Assistant Attorney General, P. O. Box 12548, Austin, Texas 78711 and Henry Wade, Criminal District Attorney, Dallas County Courthouse, Dallas, Texas as attorneys for the Respondent on this 5 day of November, 1977 by certified United States mail, postage prepaid.

Delmar L. Cain